United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-2036

United States Court of Appeals
For the Second Circuit

ROBERT RICKENBACKER,

Appellant,

v.

THE WARDEN, AUBURN CORRECTIONAL FACILITY AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

On Appeal From The United States District Court For The Eastern District of New York

APPELLANT'S PETITION FOR REHEARING

AND SUGGESTION FOR IN BANC CONSIDERATION

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On the Petition:
FREDRIC J. GROSS

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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ROBERT RICKENBACKER,

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v. No. 76-2036

THE WARDEN, AUBURN CORRECTIONAL FACILITY, and

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

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APPELLANT'S PETITION FOR REHEARING,

AND SUGGESTION FOR IN BANC CONSIDERATION

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Now comes your appellant, Robert Rickenbacker, by his attorney, and pursuant to F.R.App.P. 40 respectfully petitions for a rehearing in the above-captioned cause; additionally, pursuant to F.R.App.P. 35(b), appellant suggests that the cause be reheard in banc.

The Panel Opinions

The judgment of this Court affirming the denial of §2254 relief was announced on December 22, 1976. Opinions were filed by Judge Smith, with whom Judge Meskill concurred (Slip 1063), and in dissent by Judge Oakes (Slip 1074). The slip opinions are reproduced as an appendix to this Petition.

Questions Presented

I. Should this Court join the majority of the circuits by discarding the "farce, sham, mockery-of-justice" criterion for evaluating trial counsel's assistance, because it trivializes the guarantee of effective assistance of counsel enshrined in the Sixth Amendment?

II. Does the minimum performance of counsel that is constitutionally tolerable vary with the size of the fee, as the panel majority implies?

Statement of the Case

The pertinent facts and procedural history are adequately summarized in the panel opinion at Slip 1064-69. A more complete presentation, together with a survey of the applicable law, is contained in appellant's Brief. For present purposes, it should be sufficient to state that appellant was twice tried for a felony murder. At his first trial, the jury convicted his co-defendants but could not agree as to appellant's guilt or innocence. At his retrial, defense counsel propounded the theory that the fatal shots were fired by a stranger to the crime, and made virtually nothing of the question of appellant's identity. As it happens, the identification of appellant to the crime is, at best, weak; the facts at trial do not reasonably sustain the proposition that the stranger fired the fatal shot; and even if he'd done so, the would-be robbers would be guilty of felony murder. The jury responded rationally to trial counsel's lame efforts, and appellant was convicted.

The panel is unanimous in its criticism of trial counsel. The majority acknowledges his "apparent weaknesses." Slip 1077. It finds "troublesome" (Slip 1065) trial counsel's cross-examination,[1/] closing argument,[2/] and failure to protest the government's "objectionable" (Slip 1073) closing comment.[3/] Judge Oakes is more candid. He terms trial counsel's performance "hopelessly inept." Slip 1074.

The panel splits on the first question presented by this Petition. The majority adheres to the standard first announced -- without benefit of critical analysis -- in United States v. Wight, 179 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). Alternatively, after reciting the law of other circuits, the majority baldly asserts that every other court would reach the same result. Judge Oakes would recognize that the Wight standard cannot withstand critical analysis, and concludes that this appeal presents an appropriate vehicle for burying a doctrine whose sole strength lies in the dead weight of stare decisis.[4/]

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1. Counsel asked a total of under 30 questions of the seven prosecution witnesses. Most of the questions reflect no apparent purpose. The full cross-examinations are set out in notes one through four of the Slip Opinion.

It can fairly be said that trial counsel's cross-examination rivals that conducted by Rupert Carleton in A.A. Milne, The Barrister (1941), reprinted in E. London (ed.), 1 The World of Law 419 (1960).

2. The panel felt unable to assess the impact of the closing argument. Slip 1072.

3. The comment at issue is quoted in full at Slip 1069.

4. Appellees have not seen fit to urge retention of the "farce, sham, mockery-of-justice" standard.

The second question presented by this Petition is generated by the majority's sua sponte interjection into this case of the element of financial remuneration. In note five (Slip 1073), the panel implies that trial counsel's mediocre performance was commensurate with the mediocre payment made by the State to appointed attorneys.[5/] Accordingly, the panel excuses his betrayal of appellant.

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5. In the surrounding text, the majority takes comfort from the knowledge that "[b]oth the trial judge and the habeas corpus judge considered the performance of Lombardo [i.e., trial counsel], with whose competence they were familiar, satisfactory." If those learned jurists were referring to trial counsel's general competence, appellant takes no exception. Mr. Lombardo is, after all, a past president of the Brooklyn Bar Association. And he now is "chairman of a 13-member judicial screening committee set up by Mr. [Meade] Esposito and George L. Clark, Jr., the Brooklyn Republican County leader, two years ago." Chambers, How a Judge is Made in Brooklyn, New York Times, Jan. 3, 1977 p. 1 col. 5, at p. 10 col. 3.

Insofar as the lower court judges were characterizing the constitutional sufficiency of trial counsel's efforts, the majority overlooks a critical factor: both the trial judge and the habeas judge were bound by the "farce, sham, mockery-of-justice" standard. Thus the majority indulges in elementary bootstrapping.

It should be noted in this regard that the New York State courts have moved away from the stringent standard that prevailed at the time of appellant's trial. See People v. Labree, 34 N.Y.2d 257, 260-61, 357 N.Y.S.2d 412, 414-15 (1974); People v. Bennett, 29 N.Y.2d 462, 466-67, 329 N.Y.S.2d 801, 804 (1972)(relying on Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), which sets specific requirements, based on ABA Standards, for counsel to discharge).

Reasons for Granting Rehearing In Banc

I. This Court's talismanic chant, which precludes relief from convictions entered after obvious breakdowns in the adversary system, itself constitutes a farce, sham and mockery of the sixth amendment right to the effective assistance of counsel.

A. The sixth amendment contains the constitutional building blocks upon which our adversary system has become the most reliable human method for determining the truth. The distinctive rights to notice, confrontation, compulsory process, and the assistance of counsel assure the humblest citizen no less opportunity to demonstrate the truth than is available to the government. But the fullest exercise of these rights will be unavailing if the fact finder is beholden to the prosecutor.[6/] Recognizing this, the Framers incorporated in the sixth amendment the strongest possible protection against prosecutorial forum-shopping and its noxious concomitant, guilt by accusation.[7/] But the most important of these rights is the right to effective assistance of counsel, because in contemporary trials, counsel has -- or should have-- the special skills needed to breathe life into the other rights. See

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6. Although the UCMJ (10 USC §§801 et seq.) provides superb procedural protections, the problem of command influence in military courts and boards remains endemic. See O'Callahan v. Parker, 395 U.S. 258, 263-65 (1969). Similarly, justice is necessarily compromised where the fact-finder's financial interests turn on the outcome. Ward v. City of Monroeville, 409 U.S. 557 (1972).

7. The rights to speedy and public trial, to an impartial jury drawn from the district of the offence, and to prior ascertainment of that district, all combine to preclude unfair advantage. See Zicarelli v. Gray, __F.2d__, 20 Cr.L. 2035 (3d Cir. 1976)(en banc).

generally, Faretta v. California, 422 U.S. 806 (1975); United States v. Ash, 413 U.S. 300, 309 (1973).

The panel majority does not approach the role of counsel from the perspective of its centrality to the adversary system. Nor does it focus on the validity of the fact-finding process as the measure of a fair trial. Instead, it sets up a peculiar balance pan, in which a handful of pluses in the abstract will outweigh a plethora of indicia of incompetency. Thus trial counsel twice is complimented (Slip 1068-69, 1072) for preventing introduction of evidence of prior convictions -- the exclusion of which is virtually automatic in New York courts. He gains another plus for arguing identification, although the majority is unable to say that he argued it effectively, or that he had developed the record upon which to argue it effectively. And he did object to some of the prosecutor's closing comments, although not the quoted comment that alone should have commanded reversal on direct appeal. Such thin straws, taken out of the dynamic context of a trial, cannot be sufficient to overcome the heavy evidence establishing incompetence.

B. The panel opinion overlooks the decision in Hardy v. United States, 375 U.S. 278 (1964). There, an indigent federal defendant desired to prosecute an appeal from his conviction, but his appointed trial counsel had withdrawn. The appeal therefore had to be perfected with the aid of a new attorney. Under the rules and practices then prevailing, defendant could not obtain more

than a partial trial transcript. Only those portions of the record in which error allegedly occurred would be provided. Any allegation of error necessarily was advanced by the accused or his trial counsel, since appellate counsel was a stranger to the trial.

On certiorari, the Supreme Court construed the pertinent statutes as requiring the government to furnish a complete transcript, because otherwise "counsel's duty cannot be discharged." 375 U.S. at 282; see also id. at 280.

It is impossible to harmonize the panel's finding of competent counsel under any standard[8/] (Slip 1071-72) with the Supreme Court's recognition in Hardy that effective representation presupposes familiarity with the whole case. Surely

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8. The judges of most sister circuits might not care to be painted with the ipse dixit of Judge Smith's constitutional brush. In the unlikely event that the District of Columbia Circuit would tolerate trial counsel's incredible theory of the case, it would undoubtedly remand for an evidentiary hearing to determine whether the sudden abandonment of the intent to present defense witnesses (Slip 1069) reflected considered strategy or inexcusable failure to prepare for trial. Cf. United States v. DeCoster [II], ___F.2d __, 20 Cr.L. 2080 (D.C. Cir. 1976).

The Third and Fourth Circuits would undoubtedly grant relief upon finding that trial counsel had breached his duty to read the mistrial transcript in preparation for the retrial. Cf. Moore v. United States, 432 F.2d 730 (3d Cir. 1970)(en banc); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).

The Fifth Circuit would not likely have found that trial counsel was "rendering reasonably effective assistance," United States v. Fessel, 531 F.2d 1275, 1278 (5th Cir. 1976); especially when that court applies a less stringent standard in cases of assigned, rather than retained, counsel. Cf. U.S. ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976). The Sixth Circuit, as Judge Smith observes, follows the same standard. Slip 1071.

[footnote continued on next page]

if meaningful appellate advocacy necessarily entails familiarity with the whole trial record, meaningful trial advocacy necessarily entails familiarity with the record of a prior mistrial.[9/]

Appellant's trial counsel had no familiarity with the record of the mistrial. This is proven by his trial conduct. He could not rationally have disputed the corpus delecti, and all but conceded the questionable identification of his client, unless he was oblivious to the events at the prior trial. The first jury hung because the witnesses to the crime could identify the other co-defendants, but not appellant. At the second trial, none were cross-examined to develop their non-recognition of the accused as a perpetrator. The first jury heard Officer Walsh base his

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[footnote continued from page 7]

The Seventh and Eighth Circuits are aligned with the Third Circuit in applying variants of the civil malpractice standard. See cases cited at Slip 1071.

Although the Ninth Circuit position is identical to this Court's, see United States v. Stern, 519 F.2d 521 (9th Cir. 1975); in a capital case -- which but for the fortuitous intervention of time and place the present case might have been -- that circuit has applied the Fifth Circuit's rule. Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), citing McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).

It seems more than likely that the First Circuit would have accepted the present appeal as the long-desired vehicle for discarding the "farce, sham, mockery-of-justice" standard. See Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974); Moran v. Hogan, 494 F.2d 1220 (1st Cir. 1974); cf. Karger v. United States, 388 F.Supp. 595 (D.Mass. 1975)("reasonably diligent and conscientious" standard applied).

9. The force of this argument is augmented by the holding in Ross v. Moffit, 417 U.S. 600 (1974). There trial counsel is deemed much more important than appellate counsel. The former is both a sword and a shield, sparring with the benefit of the presumption of innocence; the latter is but a sword, contesting the manner in which guilt was established.

identification of appellant on glimpses gained during a few seconds of chase. The second jury never learned that seconds has been converted into minutes -- because trial counsel forfeited the opportunity tc impeach by prior inconsistent statements. This was no considered trial strategy; this was inexcusable ignorance, utter lack of preparation.

Surely if the State had withheld the mistrial transcript, this Court would invalidate appellant's conviction. Cf. Hardy v. United States, supra; United States v. Durant, __F.2d__, Slip 635 (No. 76-1198, 2d Cir. 1976)(refusal to provide funds for defense to hire expert; statutory construction). In the wake of Griffin v. Illinois, 351 U.S. 12 (1956), and its progeny, it is beyond dispute that the State could not constitutionally handcuff appellant by withholding the mistrial transcript. But appointed trial counsel, the panel holds, is free to manacle himself by ignoring that transcript. How easily the Court forgets that "defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." Faretta v. California, 422 U.S. 806, 834 (1975).[10/]

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10. In reality, the panel seems to have chosen to humiliate trial counsel for his indecent performance, by publishing notice to that effect in the Federal Reporter. To that extent, the panel has disproved the substance of the quotation from Faretta.

It is surely this Court's prerogative to expose deserving members of the bar to scorn. But it is a bit discomfitting when this is done without notice and an opportunity to be heard. It is even more discomfitting to observe the Court pillory counsel for his failure to protect appellant's interests, when the Court refuses to extend its protection to the same interests. Appellant finds slight solace and much cause for bitterness in the majority's determination to forfeit his freedom while ridiculing his trial counsel. It is as though Humpty Dumpty controlled the meaning of effective representation. See L. Carroll, Through the Looking Glass ch. 6 (1871).

C. The "farce, sham, mockery of justice" criterion is deserving of its own short chapter in the history of constitutional jurisprudence. From its ill-considered first appearance in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945), much like Topsy it "just growed." It was adopted by every circuit and the military judiciary, although some had discarded it before the later arrivals discovered it.

As Judge Oakes points out, "Diggs simply cannot withstand analysis." Slip 1075. No court that has attempted an analysis has adhered to the Diggs standard. No commentator has attempted to justify its continued application. See Stone, Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences, 7 Col. Human Rights L.Rev. 427 (1975), for the most recent survey of the case law and literature.

In reality, the application of the Diggs doctrine in this Circuit has produced a singular result. Except where matters dehors the record demonstrate a strong probability that counsel's strategic decisions "'pertained only to his own considerations'" U.S. ex rel. Maselli v. Reincke, 383 F.2d 129 (1967) or those of another client, counsel's uncomplaining presence at trial is invariably sufficient to defeat an assertion of ineffective assistance. The Diggs formula is reminiscent of the Emperor's new clothes; the rest of the world knows the truth of the matter. It is long since time for this Circuit to abandon such a shameless conceit, and breathe new life into the sixth amendment's promise.

II. Neither an accused's financial resources, nor those provided by the State for indigents, ought inform this Court's constitutional evaluation of an attorney's performance.

The panel majority's allusion to the monetary compensation received by trial counsel from the State (Slip 1073 n.5) seems to imply that because counsel was underpaid, he was entitled to underperform. The better view, with all due respect, is that because trial counsel underperformed, he was overpaid.

In any event, since he was paid by the State, the majority is suggesting that the States are free to muffle Gideon's trumpet by withholding adequate financial remuneration from assigned counsel. Although the pragmatic validity of that proposition may, unfortunately, be substantial, its logical refutation is implicit in its statement. An explicit refutation is contained in this Court's opinion in United States ex rel. Maselli v. Reincke, 383 F.2d 129, 133-34 (1967). There this Court rejected the contention that there should be different measures of adequacy depending on whether counsel were assigned or retained, and reaffirmed the precept that equal justice cannot depend on the financial resources available to the litigant.

Conclusion

For the foregoing reasons, an in banc rehearing should be granted with a view to discarding the Diggs formulation and excising the unfortunate sua sponte reference to trial counsel's pay.

Respectfully submitted,

AARON J. JAFFE
Attorney for Appellant

On the petition:
FREDRIC J. GROSS

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 39—September Term, 1976.

(Argued September 14, 1976 Decided December 22, 1976.)

Docket No. 76-2036

ROBERT RICKENBACKER,

Relator-Appellant,

v.

THE WARDEN, AUBURN CORRECTIONAL FACILITY, and THE PEOPLE OF THE STATE OF NEW YORK,

Respondents-Appellees.

Before:

SMITH, OAKES and MESKILL,

Circuit Judges.

Appeal from denial of petition for a writ of habeas corpus by the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., *Judge*. Appellant's petition is based on a claim that his counsel at trial for murder was so incompetent as to violate his sixth amendment rights.

Affirmed.

AARON J. JAFFE, New York, N.Y. (Molly Colburn, Law Student, on the brief), *for Appellant.*

LILLIAN Z. COHEN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of Counsel), *for Appellees.*

SMITH, *Circuit Judge:*

Robert Rickenbacker appeals from the denial of his petition for a writ of habeas corpus by the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., *Judge.* On appeal Rickenbacker's sole claim is that his counsel at his trial for murder was so incompetent as to violate his sixth amendment rights. We find no error and affirm the denial of his petition.

I.

About 6:30 p.m. on July 30, 1970 three men entered a grocery store in Brooklyn. During the ensuing robbery a man helping the store owner was killed. Two nearby New York City patrolmen, Thomas Walsh and Donald Scannapieco, heard shots and went toward the store. They saw three men running in the direction of a parked gypsy taxi containing a fourth man. Scannapieco arrested one of the three robbers and the man in the taxi. Walsh chased the other two men through the streets and a store, first in his patrol car and then on foot. He captured one robber, and the other one escaped. The police were told that the escapee was Rickenbacker and that he lived at 63 Decatur Street in Brooklyn. Police went to that address and were unable to locate Rickenbacker, despite a search of the neighborhood. About eight months later, on March 11, 1971, Detective Robert Marshall, who was in charge of the investigation, saw appellant in the police station while he

was in custody for another unrelated offense. Marshall asked him his name and address. When he responded Robert Rickenbacker, 63 Decatur Street, he was arrested.

The driver of the parked car pleaded guilty to a lesser offense during the first trial in May, 1971. While the jury could not agree on a verdict as to Rickenbacker, it found the other two men guilty of murder. At Rickenbacker's second trial in October, 1971 he was represented by Joseph Lombardo, another court-appointed attorney. At the second trial, in New York Supreme Court (Kings County), the jury deliberated less than two hours and found him guilty of murder. He was sentenced to 25 years to life imprisonment and is currently confined in Auburn Correctional Facility.

His conviction was affirmed without opinion by the Appellate Division, Second Department, and leave to appeal to the New York Court of Appeals was denied on November 14, 1974. He then filed a petition for a writ of habeas corpus, which was denied by Judge Platt on February 24, 1976.

II.

Rickenbacker argues that his attorney's incompetence is shown by (1) his failure to make an opening statement, (2) his failure to object to the introduction of a gun, (3) his failure to object to portions of the charge to the jury, (4) his inadequate cross-examination, (5) his ineffective closing argument, and (6) his failure to object to portions of the government's closing argument. While we find no merit in the first three claims, the last three raise troublesome issues.

The testimony at the trial took some two hours to present. The government presented seven witnesses, and Rickenbacker presented none.

Sam Fichera, the owner of the store, testified and described the robbery. He said he was able to identify only two of the robbers, Morgan and Ferguson, and that Morgan had had a gun. On cross-examination he answered nine questions about the gun he owned and which he had fired at the robbers while pursuing them.[1]

Michael Petrancosta, who was helping Fichera at the time of the robbery and who is the son of the victim, testified and described the robbery. He said he was able to identify one robber, Morgan, and that Morgan had had a gun. There was no cross-examination.

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1 The entire cross-examination of Fichera was:

Q. Did you say you own a 38 Smith and Wesson? A. Yes.

Q. After this incident that you've testified to, was that weapon ever examined ballistically by the Police Department? A. They did. Somebody that came at—the Police Department checked it out.

THE COURT: Did someone examine it, yes or no?

THE WITNESS: Yes, at the Police Department.

Q. By examining it, did they fire the gun? A. I don't know.

MR. SCHMIER: Objection, your Honor.

THE COURT: Objection sustained.

Q. What did you see them do?

MR. SCHMIER: Objection.

THE COURT: They examined it, he said.

A. I handed them the gun and they went in another room and I don't know what happened.

Q. How long did they have the gun? A. What's that?

Q. How long did they have the gun? A. Not long, about half an hour after I was being questioned at the police station.

Q. And—

THE COURT: (int'g) They gave the gun back to you?

THE WITNESS: Right.

Q. They gave the gun back to you? A. Yes.

Q. Did you hear the gun being fired at any time?

MR. SCHMIER: Objection, your Honor.

THE COURT: You heard the gun fired when you fired it? You say you fired two shots?

MR. LOMBARDO: I don't mean that, your Honor. While the police had it.

THE COURT: Objection sustained.

MR. LOMBARDO: I have no further questions.

Patrolman Thomas Moore testified that he saw the victim after the robbery and that he was dead. There was no cross-examination.

Patrolman Walsh testified and said he saw three men running toward the taxi and that two, Morgan and Rickenbacker, were carrying guns. He described the chase and identified Rickenbacker as the person who had eluded him. He said that during the chase Rickenbacker threw a gun between the two parked cars. The gun was later retrieved and was introduced in evidence. On cross-examination Walsh answered nine questions and said that during the chase, which lasted three or four minutes, the robbers were running fast and that he had turned possibly five corners.[2]

Patrolman Scannapieco testified that he saw three men run toward the taxi and that two, Morgan and Rickenbacker, were carrying guns. He said that Rickenbacker ran

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2 The entire cross-examination of Walsh was:

Q. Officer, during the time that you say you were chasing these two men, at any time were they walking or were they always running? A. Always running.

Q. So, in answer to Mr. Schmier's question, when you said it was a chase, it was, in effect, a chase, they were running and you were chasing; is that correct? A. Yes, sir.

Q. And were they running, in your opinion, as fast as they could? A. They were running fast.

Q. They were running fast. Did I understand you to testify that at one point you got into your car after you had seen the two men running away and turned the corner to chase them; is that correct? A. Yes, sir.

Q. Now, did you turn a corner more than once while you were chasing them? A. Yes.

Q. How many times? A. In total possibly five times.

Q. All right. Could you tell me, sir, how much time elapsed from the time you first saw the three defendants until the time that you apprehended the one defendant you have told us about? A. From the initial time I saw them until I apprehended Ferguson?

Q. Yes, sir. A. Three or four minutes, possibly.

Q. That would be your best estimate; is that correct? A. Yes, approximately I would have to say.

MR. LOMBARDO: No further questions.

within 20 feet of him and that he saw his face. He then identified Rickenbacker. On cross-examination he answered seven questions and said all three robbers were male Negroes.[3]

Detective Marshall testified that he searched 63 Decatur Street and other places in the neighborhood for about a month and was unable to find Rickenbacker and that when he was arrested on March 11 Rickenbacker gave 63 Decatur Street as his home address. On cross-examination he answered four questions and said that the first time he had ever seen Rickenbacker was on March 11 at the Brooklyn police station.[4]

The identification testimony concerning Rickenbacker was essentially the same as in the first trial, in which the jury failed to agree. In the second trial the state for the first time brought in the evidence of Rickenbacker's absence from his usual haunts on a theory of flight to avoid prosecution. Lombardo succeeded in keeping out evidence

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3 The entire cross-examination of Scannapieco was:

Q. Officer, these three men that you say you first saw running in your direction, were they all the same color? A. Color, sir?

Q. Yes, were they all black? A. All male Negroes.

Q. All male Negroes. When you first saw them, were they running in your direction? A. Yes, sir.

Q. And then the other two turned and ran back away from you, is that your testimony? A. Which other two, sir?

Q. The two that did not get into the car. A. Yes, sir, they turned.

Q. They turned and ran; is that correct? A. Yes, sir.

Q. And your partner then gave chase? A. Correct, sir.

MR. LOMBARDO: No further questions.

4 The entire cross-examination of Marshall was:

Q. Officer, did I understand you to say that when you first saw the defendant, you saw him at a police station? A. Yes, I did.

Q. When was that? A. March 11th of this year.

Q. In Brooklyn? A. Sixty-seventh Precinct in Snyder Avenue.

Q. Do you know whether or not he had been arrested in Brooklyn? A. Yes, sir.

MR. LOMBARDO: No further questions.

the state sought to adduce that Rickenbacker had failed to make his weekly report to his parole officer during the eight months between the holdup and his arrest.

Dr. Wald, the medical examiner, testified that the victim died from a gunshot wound. There was no cross-examination.

At the close of the state's case Rickenbacker's attorney told the court that Rickenbacker wanted to call some witnesses. After some discussion between Rickenbacker and his attorney, the defense decided not to call any witnesses.

Rickenbacker's attorney gave a brief (13 double-spaced typed pages) summation in which he stressed the failure of the state to introduce any fingerprints from the gun Rickenbacker allegedly threw between the two parked cars, the failure of Fichera and Petrancosta to identify Rickenbacker, the circumstances under which Walsh and Scannapieco saw the robber during the chase, the meager efforts the police made to find Rickenbacker, and the fact that Rickenbacker was later found in Brooklyn.

The state's closing argument emphasized Rickenbacker's flight from his home and the reliability of the identification by Walsh and Scannapieco. During his argument the prosecutor said, without objection, "if one juror is fooled, the People have lost the case and I don't mean lose like Baltimore losing to Pittsburgh. We've lost on behalf of the People of the State of New York, to bring a defendant to justice whom the People feel merits justice in the form of a guilty verdict."

III.

Rickenbacker concedes that in this circuit the standard for inadequate counsel was enunciated in *United States* v. *Wight,* 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950). "[U]nless the purported representa-

tion by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." This court has reaffirmed this standard numerous times in recent years. *Lunz* v. *Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States* v. *Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 109 (2d Cir.), *cert. denied*, 402 U.S. 909 (1971); *United States* v. *Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970).

We agree with Judge Platt that by the *Wight* standard Rickenbacker's attorney was not so incompetent as to warrant reversing Rickenbacker's conviction.

Wight is based on the due process clause of the fifth amendment and the assistance of counsel clause of the sixth amendment. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and its progeny rest on the sixth and fourteenth amendments. *Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir. 1970) (per curiam).

Rickenbacker invites this court to follow other courts in rejecting the "farce and mockery" standard. The District of Columbia Circuit, which originated the "farce and mockery" standard in *Diggs* v. *Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945), has now said that the test is whether the defendant had "reasonably competent assistance of an attorney acting as his diligent

conscientious advocate." *United States* v. *DeCoster,* 487 F.2d 1197, 1202 (D.C. Cir. 1973). The Third Circuit says "the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore* v. *United States,* 432 F.2d 730, 736 (3d Cir. 1970) (*en banc*). The Fifth Circuit has said the test is having "counsel reasonably likely to render *and rendering* reasonably effective assistance." *United States* v. *Fessel,* 531 F.2d 1275, 1278 (5th Cir. 1976). The Sixth Circuit has also adopted this standard. *United States* v. *Toney,* 527 F.2d 716, 720 (6th Cir. 1975). The Seventh Circuit has said that the attorney's performance must meet "a minimum professional standard." *United States ex rel. Williams* v. *Twomey,* 510 F.2d 634, 640 (7th Cir.), *cert. denied sub nom. Sielaff, Corrections Director* v. *Williams,* 423 U.S. 876 (1975). The Eighth Circuit has said "the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar." *Johnson* v. *United States,* 506 F.2d 640, 646 (8th Cir.), *cert. denied,* 420 U.S. 978 (1974).

In the context of cases where a defendant claims he pleaded guilty because he had incompetent counsel, the Supreme Court has held that the defendant must show that his attorney's advice was "outside the 'range of competence demanded of attorneys in criminal cases.'" *Tollet* v. *Henderson,* 411 U.S. 258, 268 (1973), quoting *McMann* v. *Richardson,* 397 U.S. 759, 771 (1970).

IV.

It may be that this court should reconsider the standard set forth in *Wight.* But we need not decide this issue now, for we conclude that the performance of Rickenbacker's counsel does not fail to meet any of the sug-

gested standards, all of which involve the heavy burden of establishing incompetence.

Review of the records of the two trials reveals apparent weaknesses in Lombardo's performance. Walsh's testimony in the first trial measured the time Rickenbacker was in his sight during the chase in seconds, in the second trial at three or four minutes possibly. Lombardo did not focus in cross-examination on the time discrepancy, but brought out the fast running and the corners turned. While Lombardo sought unsuccessfully a second *Wade* hearing on the claim that Walsh's identification was tainted by the circumstances of his observation of a photograph of Rickenbacker after the chase and before identification at the trial, he chose not to explore the subject on cross-examination.

Lombardo was unsuccessful in keeping from the jury evidence from which the jury could infer that Rickenbacker was in flight or hiding for some eight months after the crime, although he did succeed in keeping out proffered evidence that Rickenbacker had failed to make required weekly reports to his parole officer during the period.

Lombardo's summation, while somewhat longer than that of counsel in the first trial, covered only 13 pages of transcript. It did however argue the questions of identification and flight and there is no way we can really assess the manner of its delivery or its impact. The jury did call for the reading of the full testimony of Officers Walsh and Scannapieco, the identifying witnesses.

Rickenbacker's attorney had access to the transcripts of the first trial and the prior hearing called for by *United States* v. *Wade*, 388 U.S. 218 (1967). Reading the results of past cross-examination of the state's witnesses, Rickenbacker's attorney may reasonably have concluded that more extensive cross-examination would strengthen rather than weaken the state's case. His closing argument, while

brief, did discuss all the important points the jury should consider. The prosecutor's remark in summation was objectionable and should have called forth a protest and request for censure. To other remarks Lombardo did object. That he let one slip by is not, we think, sufficient to establish incompetence. The courts cannot guarantee errorless counsel or counsel who cannot be made to seem ineffective by hindsight. The fact that "the case could have been better tried" is not sufficient reason to sustain appellant's claim. *United States* v. *Katz,* 425 F.2d at 931. Both the trial judge and the habeas corpus judge considered the performance of Lombardo, with whose competence they were familiar, satisfactory.[5] We cannot say that his performance was outside the required level of competence.

Affirmed.

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5 Professional integrity, not financial reward, is currently the only incentive for an experienced attorney to prepare thoroughly when he acts as appointed counsel. The record indicates that Rickenbacker's appointed attorney received a fee of "$500 or $750" (Appendix, S-11).

OAKES, *Circuit Judge* (dissenting):

I agree that, in all probability, Rickenbacker's defense counsel's performance, while hopelessly inept, was probably not a "farce and mockery" within the long line of cases in this circuit referred to by the majority, despite such features as "cross" examinations of the key prosecution witnesses that served only to give the witnesses an opportunity to repeat their direct testimony. But, particularly in view of this court's promotion of higher standards of advocacy, in the wake of Chief Judge Kaufman's well-chosen remarks,[1] I think the time has come to follow the lead of the six other circuits (including the originating circuit) that have rejected the rule of *Diggs* v. *Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). And I cannot agree that counsel's performance here was up to the standard of reasonable competency to which the better rule speaks.

Judge Smith for the majority has, as always, stated the facts fully and fairly, so they need not be restated. In my view it was unreasonably incompetent for appellant's counsel not to drive home the fact that neither Fichera, the store owner, nor Petrancosta, the victim's son, could identify the defendant and not to query Officer Walsh regarding the weapon he said he had found, the absence of fingerprints on it, and his opportunities for observation of the third man during the chase. Counsel did not even object to the introduction of the weapon. These examples could be multiplied; I need not belabor

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1 *See, e.g.*, Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974); *New Admission Rules Proposed for Federal District Courts*, 61 A.B.A.J. 945 (1975) (summary of work of advisory committee to Second Circuit Judicial Conference and of advocacy qualifications for admission to Second Circuit bar). *See also* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227 (1973).

the point, as I think footnotes 1-4 of the majority opinion are almost self-compelling. When these are considered along with the facially absurd proposition advanced by counsel in summation, that perhaps it was a shot from Fichera's own weapon that killed Vito Petrancosta, it is a wonder that the jury took as long as it did to convict.

United States v. *Wight*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950), the case that established our circuit's "farce and mockery" standard, followed *Diggs* and its District of Columbia Circuit progeny and *United States ex rel. Feeley* v. *Ragen*, 166 F.2d 976 (7th Cir. 1948), which also relied on *Diggs*, *id.* at 981. As the majority opinion recognizes, both the District of Columbia and Seventh Circuits, along with four others, have now abandoned this standard. *Diggs* simply cannot withstand analysis. The Supreme Court cases on which it relied, 148 F.2d at 669 n.3,[2] all held that, where the trial proceedings had been turned into a farce or mockery of justice, a conviction could not stand; none held that the proceedings *must* have come to that point to warrant judicial intervention. The principal rationale advanced in *Diggs*, *id.* at 670, that "[i]n many cases there is no written transcript," thereby giving a habeas petitioner "a clear field for the exercise of his imagination" (and thereby presumably inundating the federal courts), no longer holds true, since written transcripts are now generally available. Gideon's Trumpet has long since sounded.[3] We should

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2 The five cases cited were *Moore* v. *Dempsey*, 261 U.S. 86 (1923) (mob violence); *Powell* v. *Alabama*, 287 U.S. 45 (1932) (mob violence; no counsel appointed); *Mooney* v. *Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony by prosecutor; writ not issued for failure to exhaust state remedies); *Brown* v. *Mississippi*, 297 U.S. 278 (1936) (coerced confession); and *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) (no counsel at trial).

3 *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963); A. Lewis, *Gideon's Trumpet* (1964).

join the several other circuits that have rejected *Diggs* as no longer having precedential value and declare it a dead letter, bringing the law of our circuit into line with the rule of, *e.g., United States* v. *DeCoster,* 487 F.2d 1197 (D.C. Cir. 1973), that, under the Sixth Amendment, "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate," *id.* at 1202 (emphasis omitted). *See also* Finer, *Ineffective Assistance of Counsel,* 58 Cornell L. Rev. 1077 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 Nw. U. L. Rev. 289 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant,* 78 Harv. L. Rev. 1434 (1965).

Forty-four years ago, Mr. Justice Sutherland wrote: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932). In 1976 I think our court should recognize that the right is equally meaningless if counsel is not at least reasonably competent.

I dissent.

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the "Appellant's Petition for Rehearing and Suggestion for In Banc Consideration" in Rickenbacker v. Warden, No. 76-2036, to be served upon opposing counsel by mailing same first class postage prepaid this fifth day of January, 1977, addressed to:

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